IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 1 of 2005
With
CRIMINAL APPEAL No. 2292 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

STATE OF GUJARAT - Appellant(s)
Versus
THAKORE BALVANTJI SOMAJI - Respondent(s)

==========

Appearance :
MR AJ DESAI, ADDL. PUBLIC PROSECUTOR for Appellant(s) : 1,
MR BS SUPEHIA for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 28/10/2005

COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This Confirmation Case arises from the judgment and order dated 15.12.2004 rendered by the learned Additional Sessions Judge, (Fast Track Court No. 2), Mehsana in Sessions Case No. 152 of 2003 convicting accused Balwantji Somaji Thakore, aged about 18 years, for the offences punishable under Sections 376 and 302 IPC and sentencing the accused to life imprisonment for the offence punishable under Section 376 and to death penalty, subject to confirmation by this Court, for the offence punishable under Section 302 IPC.

2. Criminal Appeal No. 2292 of 2004 is filed by the accused against the aforesaid judgment and order of conviction and sentence.

3. Since common questions of fact and law are involved, both the Confirmation Case and the Criminal Appeal have been heard together and are being disposed of by this judgment.

4. The prosecution case in brief is that on 29.4.2003 at

6.00 PM the accused took deceased Niyati, aged 1½ years from her mother PW 10 Kailasben Jagdish Raval for playing, but neither the accused nor the deceased returned. Hence, the search was started at about 8.00 PM when the father of the deceased returned home. The accused and the deceased were last seen together by PW 9 Binalben Dineshchandra Vyas. The accused was caught by PW 5 Chamanbhai Fakirbhai at about 2.00 AM on the night between 29th and 30th April, 2003. When the people who had gathered asked the accused regarding the whereabouts of the girl (Niyati), the accused informed that Niyati may be on the otla of the Bharaivadada Mandir. When Niyati was not found at the said place, the accused was again asked about the whereabouts of the girl and he stated that Niyati may be at the well near the Brahmani Mata Temple. The dead body of Niyati was found there. Hence, intimation Exh. 11 was given to the police at 5.30 AM and the FIR Exh. 33 was lodged at 6.00 AM on 30.4.2003. The accused was arrested at 6.20 AM the same morning. On 1.5.2004 at about 8.15, pyjama (lehangi) worn by the deceased was found from the wada of PW 12 Divaben Shivabhai and the pyjama was stained with semen. The accused was charged with the offences punishable under Sections 363, 366, 376 and 302 IPC. The accused pleaded

not guilty.

5. At the trial, the prosecution led the following evidence :-

PW No.	Exh. No.	Name	Description
4	32	Jagdish Shivram Raval	Complainant – father of the deceased.
10	43	Kailasben Jagdish Raval	Mother of the deceased.
9	42	Binalben Dineshchandra Vyas	Daughter of pujari of Brahmani Mata Temple where the accused was seen with the deceased.
12	53	Divaben Shivabhai	Who keeps her buffaloes in a wada from where pyjama of the deceased and some biscuit wrappers were found.
13	54	Revabhai Prajapati	Owner of the provision store from which the accused had purchased biscuits.

5	35	Chamanbhai Fakirbhai	Who saw the accused at 2.00 AM., caught him and brought him to the residence of the complainant and helped the complainant to find out the deceased girl.
6	36	Babubhai Umedbhai Prajapati	Who helped the complainant to find out the deceased girl and confirmed the presence of PW 5 Chamanbhai.
	and		
8	41	Jayantibhai Patel	

Dr Hareshbhai Kantilal Patel who performed the post-mortem on the deceased stated in the post-mortem report (Exh. 47) that the deceased had died on account of shock due to vasovagal attack. The prosecution also examined four police officers who were concerned with either receiving the FIR or the investigation. The panchas were also examined to prove the arrest panchnama at Exh. 19, the inquest panchnama Exh. 20, scene of panchnama Exh. 23 and panchnama Exh. 25 regarding recovery of T-shirt and bangles of the deceased and panchnama Exh. 29 for recovery of pyjama of the deceased at the instance of the accused. The birth certificate (Exh. 55) dated 1.5.2003 issued by the Talati-cum-Mantri of Malekpur Gram Panchayat, Taluka

Vadnagar, District Mehsana mentioned that deceased Niyati was born on 29.6.2001 i.e. on the date of the incident, the deceased was aged one year and seven months old. The birth certificate (Exh. 56) dated 1.5.2003 issued by the primary school at Malekpur, Taluka Vadnagar, District Mehsana stated that the accused was born on 17.2.1985 i.e. the accused was aged 18 years and 2 months on the date of the incident.

6. After considering the oral and documentary evidence on record, the learned Sessions Judge found the accused guilty of the offences punishable under Section 376 and 302 IPC on the basis of the following circumstantial evidence :-

(i) The accused had taken away the deceased aged 1½ years at 6.00 PM on 29.4.2003 from PW 10 Kailasben, mother of the deceased, but did not bring the deceased back.

(ii) The deceased was last seen with the accused as per the deposition of PW 9 Binalben.

(iii) Semen stains were found on the pant of the accused.

(iv) Semen stains were found on the lehangi (pyjama) of the deceased.

(v) The medical witness PW 11 Dr Hareshbhai Kantilal Patel at Exh. 45 who had done the post mortem (report Exh. 46) indicated that the deceased was raped and that the cause of death is “vasovagal attack due to assault”. According to the said Doctor, the age of the deceased was 1½ years to 2 years. The post-mortem was performed between 2.30 PM and 3.20 PM on 30.4.2004.

The learned trial Judge acquitted the accused of the offences punishable under Sections 363 and 366 IPC on the ground that the accused had taken the deceased with him with the consent of the mother of the deceased. The learned trial Judge convicted the accused of the offences punishable under Sections 376 and 302 IPC and imposed the sentence of life imprisonment for the offence punishable under Section 376 IPC and the death penalty, subject to the

confirmation by this Court, for the offence punishable under Section 302 IPC.

It is from the aforesaid judgment and order that the present Confirmation Case as well as the Criminal Appeal arise.

7. At the hearing of the appeal, Mr BS Supehia, learned advocate for the appellant-accused has made the following submissions :-

(i) The evidence of the accused and the deceased having been last seen together is based on the deposition of PW 9 Binalben Dineshchandra Vyas. However, in her cross-examination, the said witness stated that the police had recorded the statement when she was sick and it was her father who had given the statement for her. On the other hand, PW 15 Investigation Officer – TK Patel (Exh. 58 – para 3) stated that Binalben herself had given the statement. The evidence of this witness also suffers from other contradictions and, therefore, the theory of last

seen together cannot be believed.

(ii) Semen stains on the pyjama of the accused can exist for variety of reasons and would not necessarily connect the accused with the offence of rape. Reliance is placed on the decisions in AIR 1973 SC 343 and JT 2001 (8) SC 505 (para 25).

(iii) As regards the semen stains on the lehangi (pyjama) of the deceased, it is contended that the accused was in custody of the police even before the complaint was filed, his pant had semen stains and, therefore, the possibility of the semen stains having been put by the police on the lehangi of the deceased cannot be ruled out. Even otherwise also, if the accused had committed rape, he would have removed the lehangi before the act and, therefore, there was no scope of semen on the lehangi and the presence of semen stains on the lehangi is also created with a view to frame the accused. Reliance is placed on the decision in JT 2001 (8) SC 505.

(iv) It is submitted that there is no circumstantial evidence which can connect the accused with the offence of rape. Even though the accused was alleged to have committed rape on the deceased, the accused was not medically examined by any doctor. The best and direct evidence of medical test of the accused is lacking and, therefore, the accused deserves to the acquitted. Strong reliance is placed on the decision in AIR 1946 Allahabad 191 in support of the contention that non-examination of the accused by a doctor should result into acquittal of the accused. If the accused is medically examined and no injuries are found on his private part, that should result into acquittal as held in the case of Rahim Beg vs. State of UP, AIR 1973 SC 343 and in State of Gujarat vs. Mahmad @ Munno Usmanbhai Chauhan, 1996 (2) GLR 821.

(v) When the prosecution case is that the accused had taken the deceased from her house with the consent of the deceased at 6.00 PM and since the deceased did not return, inquiries were

made from 8.00 PM onwards and the accused was caught at 2.00 AM, the natural conduct on the part of all concerned would have been to make inquiries at the house of the accused. The fact that no such inquiries were made at the house of the accused between 8.00 PM and 2.00 AM supports the defence case.

(vi) There is no evidence on record to indicate where the offence had taken place. No other marks were found either at the well of the Brahmani Mata Temple or in the wada from where the lehangi of the deceased was allegedly recovered.

(vii) The lehangi was traced after two days. When the search of the wada was made, thought its owner Divaben was there, she was sent out of the wada and, therefore, she did not know what the police had done in the wada.

(viii) Reliance is placed on the decisions in 1998 Cri.LJ 4421 and 1994 Cri.LR (SC) 554 in support

of the contention that the discovery is not substantive evidence but is merely a corroborative piece of evidence and that the Court has to be cautious while relying upon the evidence obtained by way of discovery at the instance of the accused.

(ix) The prosecution case that Chaman caught hold of the accused at 2.00 AM at night at a distance of only two minute walk from the house of the complainant, cannot be believed when about 300 village people could not find out the accused earlier.

(x) In case of circumstantial evidence, the chain has to be completed. Reliance is placed on the decision in AIR 1979 SC 1949.

(xi) The prosecution must prove its case beyond reasonable doubt. It is not sufficient for the prosecution to show that the prosecution case may be true, the prosecution has to prove that the prosecution case must be true. Reliance is

placed on the decision in JT 2001 (80 SC 505 (paras 24 to 26).

8. On the other hand, Mr AJ Desai, learned APP has opposed the appeal and submitted that all the links in the chain of circumstantial evidence have been clearly established by the prosecution beyond reasonable doubt. The accused had taken deceased Niyati aged 1 year and 7 months from the custody of her mother at 6.00 PM on 29.4.2003. Since the accused was aged 18 years on the date of the incident, and her daughter was only about 1½ years old, naturally the mother did not have any reason to suspect the design which the accused was having. It is not the case of the accused that the accused had not taken Niyati from out of the physical custody of her mother nor is it the case of the accused that after taking her out at 6.00 PM he had returned Niyati to her mother. Hence, failure on the part of the accused to explain his not returning Niyati was sufficient to fasten conviction on the accused. Even otherwise, the prosecution had led adequate evidence to show that after taking the deceased girl from the physical custody of the mother, the accused had purchased Parle-G biscuits from the shop of PW 13 Revabhai

Prajapati and that PW 9 Binalben Dineshchandra Vyas, daughter of the pujari of the Brahmani Mata Temple had also seen the deceased with the accused. Thus, apart from the accused not having explained where the deceased had gone after the accused took her out, there is positive evidence to show that the accused had taken the deceased near the Brahmani Mata Temple. It is further submitted that in view of the medical evidence that the deceased aged about 1½ years was raped, and her dead body was recovered at the instance of the accused at 2.00 AM on the night between 29th and 30th April, 2003, i.e. within eight hours after the accused had taken her from the physical custody of her mother and within a few hours from the time when the accused was last seen together with the deceased – all this material is only consisted with the guilt of the accused for the offences punishable under Section 376 as well as Section 302 IPC.

The learned APP has also submitted reply to various contentions urged on behalf of the appellant accused.

9. Having heard the learned counsel for the parties, we are clearly of the view that it has remained uncontroverted that it was the accused who had taken deceased Niyati aged about 1 year and 7 months from the physical custody of her mother Kailasben at 6.00 PM on 29.4.2003. It has clearly come out during cross-examination of Kailasben that even before the date of the incident, the accused used to take Niyati out for playing with her. The suggestion made on behalf of the accused in the cross-examination of Kailasben that after the accused had taken Niyati out, the accused had dropped Niyati at the cabin of her mother-in-law i.e. at the cabin of the mother of Jagdishbhai Raval was negatived by Kailasben. In other words, there is no challenge to the prosecution case that the accused had taken Niyati out. In this view of the matter, it was for the accused to lead some evidence to show that the accused had dropped Niyati at the cabin of mother in law of PW 10 Kailasben. Once it is held that it was the accused who had taken deceased Niyati from the physical custody of her mother Kailasben at 6.00 PM on 29.4.2003 and the accused did not return the said minor girl, and once it is shown that the deceased was only 1 year and 7 months old as per the birth certificate at Exh.

55 issued by the Malekpur Gram Panchayat and the deceased was not able to speak beyond the word “mummy”, any possibility of such 1½ year old girl returning on her own or going to any other place on her own is absolutely ruled out.

10. However, it is not necessary to rest the prosecution case on the absence of any explanation from the accused at the trial.

The evidence of PW 13 Revabhai Prajapati at Exh. 54 from whose provision store the accused purchased biscuits and the evidence of PW 9 Binalben Dineshchandra Vyas at Exh. 42 strengthen the prosecution case that the deceased was with accused in the evening. Mr Supehia for the accused submitted that the statement purported to be given by Binalben before the police was not given by Binalben herself, but by her father. However, from the evidence of the Investigating Officer who recorded the statement and the evidence of Binalben, it is clear that the statement was given by her, but obviously because Binalben was aged about 14 years, the statement was given in the presence of her father and what Binalben had stated

before the police was conveyed by her father as she had become nervous on account of presence of the police. That, however, does not detract from the veracity of the evidence given by Binalben at the trial before the Court which in substantial parts is in conformity with her statement before the police and which has not suffered from any major contradictions.

The prosecution also led evidence of PW 5 Chaman Fakirbhai at Exh. 35 wherein he has clearly stated that the people in the village had gathered together at the residence of the father of the deceased and that since the girl could not be traced, when the witness returned home at about 2.00 AM, the witness saw the accused in one locality. Hence, the witness took the accused to the residence of the father of the deceased. PW 6 Babubhai Umedbhai Prajapati at Exh. 36 and PW 8 Jayantibhai Patel at Exh. 41 confirmed that Chaman Fakirbhai had brought the accused to the residence of the father of the deceased and that upon inquiry by PW 8 Jayantibhai Patel, the accused replied that minor Niyati was on the platform (otla) near the well at the Brahmani Mata Temple. Hence, the father of the deceased, the aforesaid witnesses and other village people

went to the Brahmani Mata Temple and found out the dead body of the girl who was bleeding from the vagina. The defence has not been able to shake the credibility of any of the prosecution witnesses and not even a suggestion is made in the cross-examination of any witnesses to indicate any reason whatsoever for any of the prosecution witnesses to entertain any animosity against the accused.

11. We also find from the evidence of PW 11 Dr Hareshbhai Kantilal Patel who had performed the post-mortem on the deceased that he found blood stains on either side of the vagina of the deceased and that it was swollen and red and the muscles of the vagina were broken and ruptured. The case of death was shock on account of the vasovagal attack due to assault injury. The post-mortem note at Exh. 46 contained the following description of the injury against column No. 15 (injuries to the external genital) and column No. 17 (external injuries) :-

> 15. C/o Hed blood present around the vagina, Valva-Red.
>
> Both lakies – braised.
>
> On per Speculum Examin – hymen was ruptured Posteriorly. Full tear of ant.Vag – wall present Ex. Partial tear of post vaginal Wall

cotted blood present in vaginal sign of purging + ut.

17. Abrasion marked present on
- 1) rt. Axillanyregion
- 2) rt. Supraclaviadar region
- 3) behind the rt. ear lobe.

12. A perusal of the above evidence leaves no room for doubt that the deceased girl aged 1 year and 7 months was sexually assaulted and that assault itself resulted into the death of the minor girl. Since the deceased girl was last seen together with the accused and it was at the instance of the accused that the father of the deceased girl and other village people could recover the body of the deceased, without anything more, the prosecution can be said to have proved the involvement of the accused in the offence. Finding of semen stains on the pyjama of the accused and also on the lehangi of the deceased go to fortify the aforesaid conclusion. Hence, the contention of the accused that semen stains could have been there on the pyjama of the accused for any other reason cannot be accepted as such stains cannot be seen in isolation and the presence of semen stains on the pyjama of the accused and also on the lehangi of the deceased girl aged 1½ years fit in with the prosecution case that it was the accused and

the accused alone who had committed the offence of rape. Once that conclusion is reached, since the very act of committing rape on the 1½ year old girl resulted in the death of the victim, the accused must be held liable for both the offences punishable under Sections 376 and 302 IPC.

13. Much has been contended on the basis that absence of medical examination of the accused is fatal to the prosecution case. Reliance is placed on the decisions in **Rahim Beg vs. State of UP, AIR 1973 SC 343** and **State of Gujarat vs. Mahmad @ Munno Usmanbhai Chauhan, 1996 (2) GLR 821**. The decision in Rahim Beg (Supra) was rendered in the context of a case where the rape was alleged to have been committed by a fully developed man on the girl of 10 or 12 years who was virgin and whose hymen was intact and the Court held that the absence of injuries on the male organ of accused would point to his innocence. Apart from the fact that the decision of the Court in that case was based solely upon that factor as there were several other considerations which appeared to the Court as being inconsistent with the guilt of the accused, in that case, the Court specifically noted that no cogent explanation was offered as to why the two accused were not soon got

medically examined by the police.

Similarly, in State of Gujarat vs. Mahmad @ Munno Usmanbhai Chauhan (Supra), the victim was a girl aged about 11 years and the accused was about 25 years old and this Court followed the decision of the Apex Court in Rahim Beg (Supra).

In the facts of the instant case, however, such an explanation was not sought for from the Investigating Officer – PW 15 TK Patel (Exh. 58) as to why the accused was not sent for medical examination. In absence of any such question having been put to the Investigation Officer in his cross-examination, the defence cannot be permitted at this stage to find fault with the prosecution for not medically examining the accused after his arrest.

14. However, in the instant case, once it is held that the deceased girl aged 1½ years was last seen with the accused aged 18 years and none other than the accused is shown in the company of the deceased girl aged 1½ years from 6.00 PM to 2.00 AM and it is at the instance of the accused that the dead body of the deceased is recovered at

2.00 AM and the deceased is found to have been sexually assaulted and raped, none else than the accused could have committed the brutal sexual assault and rape on the deceased and, therefore, absence of medical examination of the accused after his arrest pales into insignificance.

15. As regards the contention that no inquiries were made at the house of the accused, the contention is misconceived. It is the case of the prosecution witnesses that since minor girl Niyati, aged 1 year and 7 months was taken by the accused at 6.00 PM and the accused did not return, the mother of the deceased informed her husband (father of the deceased) at about 8.00 PM and all the people in the neighbourhood and in the village went around searching for the deceased. They searched all over the village, agricultural fields and wells. Hence, absence of any specific statement that the village people searched for the accused at his residence cannot be fatal to the prosecution case. In fact, the accused himself was also not found anywhere and, therefore, nothing would turn upon the contention urged on behalf of the appellant.

16. In view of the aforesaid scenario, it is

immaterial that the prosecution has not pinpointed any place where the offence had taken place. Of course, the prosecution case appears to be that the offence was committed in the wada of Divaben where buffaloes are kept. A wrapper of Parle-G Glucose biscuit and three blank wrappers of Palak Company sweet supari were found. At the time of drawing panchnama, the accused admitted that he had consumed the biscuits and the sweet supari which were contained in those wrappers. Those articles were discovered on 1.5.2003.

17. It is also contended that the lehangi of the deceased was traced after two days and that when the search of the wada was made, its owner Divaben was not allowed to remain present. Much has also been stated about the evidenciary value of the semen stains on the lehangi which was recovered from the wada of Divaben. This Court is of the view that in light of the preceding discussion and the inescapable conclusion that it was the accused and the accused alone who could have committed the crime on the deceased aged 1½ years, the argument advanced with reference to the discovery of lehangi will not make any difference to the finding of guilt against the accused.

18. The contention that the failure on the part of the village people to find out the deceased till 2.00 AM makes the accused being traced out at a distance of only two minute walk from the house of the deceased, will weaken the prosecution case cannot be accepted, particularly when the dead body of the deceased was recovered at 2.00 AM at the instance of the accused and the accused alone. We are fully satisfied that the prosecution proved the case against the accused beyond reasonable doubt by establishing all the links in the chain of circumstances.

19. In view of the above discussion, Criminal Appeal No. 2292 of 2004 filed by the accused against the judgment and order of conviction deserves to be dismissed. In view of the brutal sexual assault by the accused on a minor girl aged 1 year and 7 months, the maximum penalty of life imprisonment for the offence punishable under Section 376 is fully justified.

20. Coming to the Confirmation Case and the death penalty proposed by the learned Sessions Judge, it is first necessary to refer to the leading case of **Bachan Singh vs.**

State of Punjab, (1980) 2 SCC 684 wherein the Apex Court laid down the following principles as culled out by the Apex Court in the case of **Machhi Singh vs. State of Punjab, (1983) 3 SCC 470 :-**

(i) The extreme penalty of death need not be inflicted except in the gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following

circumstances.

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or rewards; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) ... ...

(4) ... ...

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rate case, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so."

Moreover, in Bachan Singh case, the Apex Court referred to the circumstances suggested by Dr. Chitale as aggravating and mitigating circumstances for imposition of death penalty. Some of them relevant for the purpose of the Confirmation Case are as under :-

Aggravating circumstances :

(b) <u>if the murder involves exceptional depravity; or</u>

Mitigating circumstances :

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) & (6) ... .

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

21. Applying the aforesaid tests to the facts of the present case, there can be no doubt that the gravity of the offence committed by the accused aged 18 years on the minor girl aged 1 year and 7 months was certainly revolting and obnoxious so as to arouse intense and extreme indignation of the community calling for the death penalty. However, the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the

crime. The defence had made suggestions in the cross-examination of PW 8 Jayantibhai Patel (Exh. 41) and PW 6 Babubhai Umedbhai Prajapati (Exh. 36) that the accused was not a mentally balanced person and he used to roam around in the village, that he used to get fits of epilepsy and he used to fall down anywhere (pages 90 and 100). Although the prosecution witnesses had denied that suggestion, it does not appear that the accused is a person with normal understanding. Even at the age of 18 years, the accused is not shown to have gone for regular studies in the school. The accused had indicated his desire to remain present at the time of arguments before the trial Court and so also the accused had expressed such desire at the time of hearing before this Court. Accordingly, we had directed the authorities to keep the accused with police escort present before the Court at the hearing of the reference and the appeal. After the hearing commenced, the accused who was present in the Court throughout the first day and also on the second day, thereafter indicated that he had no desire to remain present at the time of further hearing. On both the aforesaid days, we had tried to ascertain the level of understanding of the accused and although we did find that the accused was capable of understanding the

nature of his act and the consequence thereof, and that the accused was also aware that he was already convicted by the trial Court and the proposed sentence was death penalty, the accused did not appear to realize the seriousness of the consequences of death penalty. We formed an impression that the level of understanding of the accused was much below average. In this set of circumstances, we are of the view that considering the circumstances peculiar to the accused who was aged 18 years at the time of the incident and is aged about 20 years at present, this does not appear to be a case where death penalty should be imposed on the accused.

22. We may refer to the two recent decisions of the Apex Court dealing with the question of death penalty where the accused is convicted of the offences punishable under Sections 302 and 376(2) IPC by committing the rape and murder of a minor girl. In **State of UP vs. Satish, (2005) 3 SCC 114,** a minor girl aged less than six years was raped and murdered and the Court held it to be one of the rarest of rare cases. The Court held that rape is one of the most depraved acts which becomes abominable when the victim is a child. The diabolic act reaches the lowest level of

humanity when the rape is followed by brutal murder.

23. On the other hand, in **Surendra Pal Shivabalakpal vs. State of Gujarat,2005) 3 SCC 127,** in a similar case, where the appellant aged 36 years had committed rape and murder of a minor girl after abducting her in the middle of the night, the Court considered the fact that the appellant was aged 36 years at the time of the occurrence and there was no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future.

24. In Bachan Singh case, the Apex Court has held that the burden is on the State to show the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society and that there was no probability that the accused can be reformed and rehabilitated.

In the facts of the instant case, the prosecution has not led any evidence to show that the accused has been

involved in any other criminal case previously. The accused appears to be a person with below average understanding and living in impecunious circumstances.

25. In most of such cases involving offences under Sections 376 and 302 IPC, the Apex Court has commuted death penalty to life imprisonment.

25.1 In **Mohd. Chaman vs. State (NCT of Delhi), 2001 (2) SCC 26,** the accused aged 30 years in the process of committing rape on a girl about 1½ years old inflicted injuries on liver and other parts of the body which resulted into the death of the child. The Apex Court held that it did not fall within the rarest of rare category.

25.2 In **Raju vs. State of Haryana, 2001 (9) SCC 50,** the victim was a 11 year old girl and the conviction was based on circumstantial evidence. The accused had enticed the deceased by offering toffee and both were last seen together going out in the evening and the accused had made extra-judicial confession that he had committed rape and killed the girl. The Court held that the accused had no intention to cause death of the deceased and the accused

having no criminal record nor can be considered to be a grave danger to the society at large, the Court awarded only life imprisonment.

25.3 In **Bantu @ Naresh Giri vs. State of MP, 2001 (9) SCC 615,** where the accused was found guilty of having committed rape and murder of a six year old girl, the Apex Court commuted the death sentence to life imprisonment.

25.4 So also in **State of Maharashtra vs. Mansingh, 2005 (3) SCC 131,** where the conviction was based on the circumstantial evidence, the Court commuted the death sentence to life imprisonment.

26. In view the above discussion, we are of the view that this is not one of the rarest of rare cases which would warrant death penalty on the accused who was aged 18 years on the date of incident and presently aged just about 21 years. Since the accused is so young and appears to have committed the offence on account of his below average level of understanding, the reformative theory may yield results.

27. In view of the above discussion, the death penalty proposed by the trial Court on accused Thakore Balvantji Somaji for the offence punishable under Section 302 IPC is not confirmed and the appellant-accused is sentenced to the sentence of rigorous imprisonment for life for the said offence.

O R D E R

28. In the result, Criminal Appeal No. 2292 of 2004 in so far as the same challenges the conviction of the appellant for the offences punishable under Section 376 and 302 IPC is hereby dismissed. The sentence of rigorous imprisonment for life for the offence punishable under Section 376 IPC is confirmed. However, in Confirmation Case No. 1 of 2005, we decline to confirm the death penalty proposed by the learned Sessions Judge and sentence the appellant – accused to suffer rigorous imprisonment for life for the offence punishable under Section 302 IPC.

Both the sentences of rigorous imprisonment for life shall run concurrently.

The Confirmation Case and the Criminal Appeal accordingly stand disposed of.

[M.S. SHAH, J.]

[BANKIM N. MEHTA, J.]

sundar/-